

SECTION I.

Introduction

This Interim Report provides initial information from the Availability and Disparity Study conducted for the California Department of Transportation (Caltrans). The study team will be collecting and analyzing additional qualitative and quantitative information before preparing conclusions and recommendations in the Final Report at the end of June 2007. All results presented in the Interim Report are preliminary and subject to refinement in the Final Report.

Results of this analysis provide information to assist Caltrans in determining how it will implement the Federal Disadvantaged Business Enterprise (DBE) Program in the future.

The balance of this section explains:

- Scope of the study;
- The Federal DBE Program;
- Legal requirements for Caltrans implementation of the Program;
- Summary of Interim Report elements; and
- BBC's next steps.

Study Scope

This Availability and Disparity Study examines the transportation construction and engineering industry in California and related contracts awarded by Caltrans or with funds administered by Caltrans. More than 600 municipalities, counties and regional agencies receive federal and state transportation funding through the Caltrans Local Assistance Program. Larger public transportation agencies such as the Bay Area Rapid Transit Authority (BART) receive funds directly from the federal government and therefore are not examined in this study.

The Study includes FHWA-, FTA- and state-funded contracts. Caltrans did not include FAA-assisted contracts in this study. The study team examined contracts in each Caltrans district. (Figure I-1 on the following page identifies Caltrans districts and regions.) Analysis includes firms receiving prime contracts and subcontracts as well as suppliers and truckers. Appendix A

(Definition of Terms) explains key terms used in the Interim Report.

Federal DBE Program

Caltrans has been implementing some version of a DBE program for federally-funded contracts for nearly 25 years. After enactment of the Transportation Equity Act for the 21st Century (TEA-21) in 1998, the U.S. Department of Transportation (USDOT) established a new Federal DBE Program.

Program elements. The elements of the Program are set forth in 49 CFR Part 26. Race- and gender-conscious measures such as DBE contract goals may be used if necessary, but are not required in a state's implementation of the Federal DBE Program. Until May 1, 2006, Caltrans had used DBE contract goals for federally-funded contracts. In response to new guidance from the courts and from USDOT, Caltrans discontinued use of DBE goals on its contracts as of May 1, 2006 and prohibited local agencies from using DBE goals on federally-funded contracts administered by Caltrans. Caltrans has implemented an all race- and gender-neutral Program since May 1, 2006.

Figure I-1.
Caltrans districts and regions



Race/ethnic/gender groups. Disadvantaged business enterprises (DBEs) are defined in the Federal DBE Program (49 CFR Section 26.5). A DBE is a small business owned and controlled by one or more individuals who are socially and economically disadvantaged. The Federal DBE Program specifies the race, ethnic and gender groups that can be presumed to be disadvantaged as well as definitions of when other firms may be socially and economically disadvantaged (explained in Appendix A). These groups are:

- Black Americans (or "African Americans" in this study);
- Hispanic Americans;

- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

There is a gross revenue limit (\$19,570,000) and a personal net worth limit (\$750,000, not including equity in the business and in personal residence) that firms and firm owners must fall below to be able to be certified as a DBE (49 CFR Subpart D). In this study:

- "DBEs" refer to disadvantaged business enterprises according to the federal definitions in 49 CFR Part 26 that have been certified as such.
- "MBEs" and "WBEs" refer to firms owned and controlled by minorities or women, according to the race/ethnicity definitions listed above, whether or not they are certified.

Legal Requirements for Caltrans Implementation of the Federal DBE Program

The new Federal DBE Program that the federal government developed in 1998 responded to the 1995 U.S. Supreme Court decision in *Adarand Constructors, Inc. v. Peña*.¹ The Court held that a federal program utilizing a racial classification is only constitutional if it serves a "compelling interest" and is "narrowly tailored" to achieve that objective.

Difference between implementing a federal program and a state or local program. In *Adarand*, the U.S. Supreme Court extended the same standard for review of federal programs that the Court had applied in 1989 to state and local governments in *City of Richmond v. J.A. Croson*.² After the *Croson* decision, many state and local minority- and women-owned business enterprise programs (non-federal programs) were held to be unconstitutional by the courts. The state and local programs found to be unconstitutional included a State of California construction subcontracting program for minority- and women-owned businesses on state-funded contracts.

Proposition 209, passed by California voters in 1996, also precludes the State from implementing race- and gender-conscious programs related to non-federally-funded contracts. As it provides for continued implementation of federally-required

¹ 515 U.S. 200 (1995).

² 488 U.S. 469 (1989).

programs, Proposition 209 does not apply to Caltrans' implementation of the Federal DBE Program.

Appendix B (Legal Environment for Caltrans DBE Program) summarizes certain key federal court decisions affecting race- and gender-conscious programs implemented by public agencies.

Requirements for implementing the Federal DBE Program. As a recipient of USDOT funds, Caltrans is required to implement the Federal DBE Program, and to narrowly tailor its implementation given factors affecting the California transportation construction and engineering marketplace. The current Federal DBE Program provides regulations that state and local governments must follow. Caltrans must:

- Set an overall annual goal for DBE participation in Caltrans' federally-funded contracts;
- Examine whether or not the annual DBE goal can be attained solely through neutral measures or whether race- or gender-based measures are needed;
- Choose the measures it will apply in an attempt to meet the annual DBE goal; and
- Identify the specific race, ethnic and gender groups that will be eligible for any race- or gender-conscious measures such as contract goals.

Overall annual DBE goal. Even though the Federal DBE Program outlined in 49 CFR Part 26 includes an overall 10 percent aspirational goal for DBE participation across the nation, state and local governments receiving USDOT funds must set an annual DBE goal specific to conditions in their relevant marketplace. The Federal DBE Program requires an agency such as Caltrans to set an annual DBE goal whether or not its program utilizes race- or gender-conscious measures such as DBE contract goals.

Measures required to attempt to meet the goal. The Federal DBE Program requires state and local governments to assess how much of the annual DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts such as DBE contract goals. The state or local government must then select specific measures it will use in implementing the Program.

The 2005 Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT* sets requirements that Caltrans must follow

in implementing the Federal DBE Program.³ In this decision, the court held that state and local governments are responsible for determining whether or not there is discrimination in the local transportation contracting industry, and for developing narrowly tailored measures if a need exists, in order to comply with the Federal DBE Program. The court found that sufficient evidence of discrimination exists nationwide to hold that the Federal DBE Program was constitutional. The court also held that narrow tailoring of the program depends on each state or local government evaluating conditions within its own contracting markets.

Accordingly, the USDOT has advised state and local agencies that any use of race- or gender-conscious remedies as part of its DBE program must be based on evidence the recipient has concerning discrimination affecting the local transportation contracting industry⁴:

- The state or local agency determines whether or not there is evidence of discrimination in its transportation contracting industry.
- The USDOT recommends the use of disparity studies to examine whether or not there is evidence of discrimination, and how remedies might be narrowly tailored.
- The USDOT suggests consideration of both statistical and anecdotal evidence. "Disparity analysis," or comparisons of DBE utilization with the relative availability of DBEs to perform the work, is an important part of the statistical information.
- Evidence must be considered for individual race, ethnic and gender groups.

This Interim Report initiates the process of evaluating whether or not there is evidence of discrimination and the need for specific program elements.

³ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005)

⁴ Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* [hereinafter DOT Guidance], available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm. (January 2006).

Summary of Study Elements

Each portion of this Interim Report integrates with other elements:

- Background information. Definitions of terms (Appendix A) and a summary legal analysis (Appendix B) are included as reference.
- Relative availability of MBEs and WBEs in the transportation construction and engineering industry in California. BBC completed telephone interviews with 18,675 construction and engineering-related businesses in California. The resulting database of firms that reported themselves to be available for transportation construction and engineering-related work forms the basis for the MBE/WBE availability analysis. Section II of the Interim Report presents the study team's results. Appendix C (Availability Survey) reviews the survey process in detail. Appendix D (Procedures for Estimating MBE/WBE Availability) describes the methodology used for estimating MBE/WBE availability.
- Types and location of Caltrans contracts and subcontracts. The study team collected information on more than 10,000 prime contracts and subcontracts. The study period for this analysis is January 1, 2002 through December 31, 2006. Appendix D documents the study team's data collection efforts.
- Analysis of any barriers to entry. The federal government cites conditions ranging from barriers in employment and training opportunities to disparities regarding access to capital and bonding as reasons for the Federal DBE Program. Courts have considered this evidence and held that it meets constitutional standards for Congressionally-adopted legislation and regulations that include race- and gender-based programs.

The study team examines whether certain barriers identified for the transportation industry for the nation as a whole apply to the transportation construction and engineering industry in California. Section III examines training and education, employment opportunities, opportunities for advancement, business ownership rates and access to capital. Appendix E (Analysis of U.S. Census of Population Data) documents related methodology.

- Initial recommendations. BBC recommends certain improvements to Caltrans' tracking of program performance. As these recommendations do not depend on ultimate study findings in the Final Report, they are presented in the Interim Report (see Section IV).

BBC's Next Steps

BBC will collect and analyze additional quantitative and qualitative information on the California marketplace and Caltrans' and local agencies' transportation construction and engineering contracts. BBC will examine whether there are disparities between utilization and relative availability of MBEs and WBEs to perform this work. The disparity analysis will encompass both federally-funded contracts and state-funded contracts (which have not had DBE goals during the study period).

Caltrans is scheduling public hearings for spring 2007 to hear testimony related to issues discussed in this Interim Report and other topics. BBC will consider this information before preparing the final report.

The Final Report will compile this information to assist Caltrans in making the following determinations:

- Level of overall annual DBE goal;
- How much of the annual DBE goal can be achieved through neutral measures, and whether race- or gender-based measures are warranted in Caltrans' implementation of the Federal DBE Program; and
- Specific measures to implement the program.

This information will be presented in the Final Report scheduled for June 30, 2007.